



Paper No. 13

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OFFICE OF PETITIONS

In re Patent No. 5,891,260
Issue Date: April 6, 1999
Application No. 08/795,038
Filed: February 5, 1997
Title of Invention: PRODUCT RECOVERY
SYSTEM

ON PETITION

This decision is in response to the petition filed July 30, 2003 under 37 CFR 1.378(b) to accept and record a maintenance fee for the above-identified patent.

The petition is **DISMISSED**.

If reconsideration of this decision is desired, a petition for reconsideration under 37 CFR 1.378(e) must be filed within TWO (2) MONTHS from the mail date of this decision. No extension of this 2-month time limit can be granted under 37 CFR 1.136(a) or (b). ***Any such petition for reconsideration must be accompanied by the petition fee of \$130 as set forth in 37 CFR 1.17(h).*** The petition for reconsideration must include the lacking item(s) noted below, since, after a decision on the petition for reconsideration, no further reconsideration or review of the matter will be undertaken by the Commissioner.

The patent issued April 6, 1999. Accordingly, the first maintenance fee due could have been paid during the period from April 6, 2002 through October 6, 2002 or with a surcharge during the period from October 7, 2002 through April 6, 2003. This patent expired on April 7, 2003.

Pursuant to 37 CFR 1.378(b), any petition to accept an unavoidably delayed payment of a maintenance fee filed under paragraph (a) of this section must include:

- (1) The required maintenance fee set forth in § 1.20 (e) through (g);
- (2) The surcharge set forth in § 1.20(l)(1); and
- (3) A showing that the delay was unavoidable since reasonable care was taken to ensure that the maintenance fee would be paid timely and that the petition as filed promptly after the patentee was notified of, or otherwise became aware of, the expiration of the patent. The showing must enumerate the steps taken to ensure timely payment of the maintenance fee, the date and the manner in which patentee became aware of the expiration of the patent, and the steps taken to file the petition promptly.

The petition filed July 30, 2003 lacks item 3 above.

A late maintenance fee is considered under the same standard as that for reviving an abandoned application under 35 USC 133 because 35 USC 41(c)(1) uses the identical language, i.e., "unavoidable" delay. Ray v. Lehman, 55 F.3d 606, 608-09, 34 USPQ2d 1786, 1787 (Fed. Cir. 1995)(quoting In re Patent No. 4,409,763, 7 USPQ2d 1798, 1800 (Comm'r Pat. 1988)). Decisions on reviving abandoned applications have adopted the reasonably prudent person standard in determining if the delay was unavoidable. Ex parte Pratt, 1887 Dec. Comm'r Pat. 31, 32-33 (Comm'r Pat. 1887)(the term "unavoidable" "is applicable to ordinary human affairs, and requires no more or greater care or diligence than

is generally used and observed by prudent and careful men in relation to their most important business"); In re Mattullath, 38 App. D.C. 497, 514-15 (D.C. Cir. 1912); Ex parte Henrich, 1913 Dec. Comm'r Pat. 139, 141 (Comm'r Pat. 1913). In addition, decisions on revival are made on a "case-by-case basis, taking all the facts and circumstances into account." Smith v. Mossinghoff, 671 F.2d 533, 538, 213 USPQ 977, 982 (D.C. Cir. 1982). Finally, a petition to revive an application as unavoidably abandoned cannot be granted where a petitioner has failed to meet his or her burden of establishing the cause of the unavoidable delay. Haines v. Quigg, 673 F. Supp. 314, 5 USPQ2d 1130 (N.D. Ind. 1987).

Petitioner's request for reinstatement of the patent under the unavoidable standard of review indicates that the computer network used was undermined and compromised. However, petitioner does not provide details as to the exact cause of the computer issues that resulted in the maintenance fees not being paid in a timely manner. Likewise, petitioner has not provided information as to what if any procedures have been taken to safeguard the system from being undermined and compromised again.

As prudent and careful practitioners, the petitioner should have taken adequate steps to prevent the issues that ultimately lead to the computer breakdowns and thus the expiration of the patent.

Petitioner has not carried the burden of proof to establish to the satisfaction of the Commissioner that the delay was unavoidable. There is a distinct difference between an unavoidable delay which, had there been reasonable care exercised, could not have been prevented and one that was the result of a mistake. However, in view of the above and since petitioner has not provided enough information for a determination that reasonable care was in fact exercised to ensure that the maintenance fee would be paid timely and that therein the delay was unavoidable, the argument fails.

Said more succinctly, the record fails to adequately evidence that the Patentee exercised the due care observed by prudent and careful men, in relation to their most important business, to establish unavoidable delay, Pratt, supra.

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